

IP 06-0068-M 1 KPF USA v Witherspoon
Magistrate Kennard P. Foster

Signed on 3/6/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	CAUSE NO. IP 06-0068M-01
DONALD WITHERSPOON,)	
)	
Defendant.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

DONALD WITHERSPOON is charged in a criminal complaint that was filed on February 27, 2006, with having forcibly assaulted, resisted, opposed, intimidated, or interfered with any person designated in Title 18 U.S.C. Section 1114 while engaged in or on account of the performance of official duties. On February 27, 2006, at the initial appearance, the government moved for detention pursuant to 18 U.S.C. §§ 3142 (f)(1)(A) and (f)(2)(A) on the grounds that: (1) this case involves a crime of violence; and (2) this case involves a serious risk that Defendant will flee if released.

A detention hearing was held on March 2, 2006. The United States appeared by Assistant United States Attorney James P. Hanlon. DONALD WITHERSPOON appeared in person and by his counsel, Juval Scott. The Court found multiple bases for a detention hearing pursuant to 18 U.S.C. §§ 3142 (f)(1)(A) and (f)(2)(A). The government established by clear and convincing evidence, predicated upon the facts precipitating Defendant's arrest on February 27, 2006, and his criminal history and record, that no condition or combination of

conditions will reasonably assure the safety of the community if he is released. The government also established by a preponderance of the evidence that there is no condition or combination of conditions that would reasonably assure Defendant's appearance. The Court ordered that Defendant be detained.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

1. DONALD WITHERSPOON is charged by a criminal complaint that was filed on February 27, 2006. The complaint is supported by the Affidavit of Mark Fullerton, a Special Agent with the Federal Protective Service, Department of Homeland Security. The complaint charged Defendant with assault of a federal officer or agent in violation of 18 U.S.C. § 111.

2. The maximum penalties for violating 18 U.S.C. § 111 as charged in the complaint include eight years' incarceration, three years of supervised release, and a fine of \$250,000.

3. The Court takes judicial notice of the complaint and the Affidavit In Support of the Complaint.

4. The government submitted the matter of detention on the complaint and affidavit.

5. The Court admitted as Exhibit 1 the Pre-Trial Services Report prepared by the U.S. Probation Office on the issue of Defendant's release or detention. Neither party objected to the admission of Exhibit 1.

6. Exhibit 1 demonstrates Defendant's criminal history to include at least 13 criminal convictions for offenses including: robbery, battery, residential entry and aggravated

battery, burglary, resisting law enforcement, forgery, theft, and criminal trespass. The most recent conviction for resisting law enforcement was in 2005. Exhibit 1 further demonstrates that Defendant failed to appear for court dates on at least seven occasions and violated the terms of court-imposed probation on at least four occasions. The most recent probation revocation was in 2000.

7. Defendant qualifies for a detention hearing upon the government's motion that this case involves a crime of violence. 18 U.S.C. § 3142(f)(1)(A). The assault charged in the complaint, which includes the use of physical contact and force, is a crime of violence. 18 U.S.C. § 3156(a)(4).

8. Defendant qualifies for a detention hearing upon the Government's motion that this case involves a serious risk that Defendant will flee. 18 U.S.C. § 3142 (f)(2)(A). Defendant's conduct and criminal history demonstrate a propensity to disregard the law, including court orders. Defendant has no ties to Indiana and no residence here.

9. The evidence relevant to the factors set forth in 18 U.S.C. § 3142(g) requires that Defendant be detained as there is no condition or combination of conditions of release sufficient to reasonably assure that he will not engage in dangerous criminal activity pending trial. Therefore, Defendant is ORDERED DETAINED.

10. When evaluating the government's motion for pretrial detention, the Court engages a two-step analysis: first, the Court determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *See United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving: (1) a crime of violence; (2) an offense with a maximum punishment of life imprisonment or death; (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more; or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses. *See* 18 U.S.C. § 3142(f)(1). A defendant is eligible for detention upon motion by the United States or the Court *sua sponte* in cases involving: (5) a serious risk that the person will flee; or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *See* § 3142(f)(2); *United States v. Sloan*, 820 F. Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. *See* 18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. *See also United States v. DeBeir*, 16 F. Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F. Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moved for detention pursuant to 18 U.S.C. §§ 3142(f)(1)(A) and (f)(2)(A). The Court has found that the government satisfied its burden of establishing that these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions set forth in Section 3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. *See* 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof

of both is not required. *See United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *See United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S. Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2d Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F. Supp. 591, 596 (N.D. Ind. 1987).

With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S. Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F. Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S. Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant’s appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

11. The Court further considers the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and

dangerousness to the community are the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

12. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

- a. For the reasons set forth *supra*, this case involves a crime of violence.
- b. Defendant has had persistent and continuous contacts with law enforcement.

In light of the number and nature of these contacts, Defendant has established a pattern of violence and disregarding the law. He is a scofflaw who continually flouts the law. If released, he will not follow the law or the conditions of pre-trial release. Defendant presents a serious risk to the community.

c. The evidence presented demonstrates a high probability that Defendant will be convicted of the charged offense.

d. Defendant has no ties to Indiana, no residence here, and a history of failing to appear for court and violating terms of court-imposed probation. Defendant presents a serious risk of flight.

The Court having weighed the evidence regarding the factors found in 18 U.S.C. § 3142(g), and based upon the totality of evidence set forth above, concludes that the Defendant

clearly and convincingly is a danger to the community and a risk of flight. The Court further concludes by a preponderance of the evidence that Defendant is a serious risk of flight.

WHEREFORE, DONALD WITHERSPOON is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with a Court proceeding.

Dated this ____ day of March, 2006.

Kennard P. Foster, Magistrate Judge
United States District Court
Southern District of Indiana

Distribution:

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